

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*,

Plaintiffs,

and

UNITED STATES of AMERICA,

Plaintiff-Intervenor,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-360  
(OLG-JES-XR)  
Three-Judge Court  
[Lead Case]

MEXICAN AMERICAN LEGISLATIVE CAUCUS,  
TEXAS HOUSE OF REPRESENTATIVES (MALC),

Plaintiff,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-361  
(OLG-JES-XR)  
Three-Judge Court  
[Consolidated Case]

TEXAS LATINO REDISTRICTING TASK FORCE,  
*et al.*,

Plaintiffs,

v.

GREG ABBOTT,

Defendant.

Civil Action No. 5:11-cv-490  
(OLG-JES-XR)  
Three-Judge Court  
[Consolidated Case]

MARGARITA V. QUESADA, *et al.*,

Plaintiffs,

v.

GREG ABBOTT, *et al.*,

Defendants.

Civil Action No. 5:11-cv-592  
(OLG-JES-XR)  
Three-Judge Court  
[Consolidated Case]

JOHN T. MORRIS,

Plaintiff,

v.

STATE OF TEXAS, *et al.*,

Defendants.

Civil Action No. 5:11-cv-615  
(OLG-JES-XR)  
Three-Judge Court  
[Consolidated Case]

EDDIE RODRIGUEZ, *et al.*,

Plaintiffs,

v.

GREG ABBOTT, *et al.*,

Defendants.

Civil Action No. 5:11-cv-635  
(OLG-JES-XR)  
Three-Judge Court  
[Consolidated Case]

**UNITED STATES' ADVISORY CONCERNING**  
**HARRIS V. ARIZONA INDEPENDENT REDISTRICTING COMMISSION**

The United States submits this advisory pursuant to the Court's Order (ECF No. 1329) inviting briefing on the impact of *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016), on this case.

The Supreme Court's decision in *Harris* does not directly affect the United States' claim before this Court. The United States has alleged and proven intentional vote dilution, which was not at issue in *Harris*. Nonetheless, *Harris* recognizes that Arizona underpopulated particular legislative districts for the express purpose of preserving minority voters' ability to elect their preferred candidates. A redistricting tool that one state applies to preserve minority electoral opportunities as required by federal statute may be used by another to impermissibly dilute minority voting strength. Thus, *Harris* sheds light on Texas's manipulation of district populations in the 2011 House Plan, which is part of the cumulative evidence of a discriminatory purpose to minimize minority voting strength.

**I. THE UNITED STATES HAS ALLEGED AND PROVEN INTENTIONAL VOTE DILUTION, NOT MALAPPORTIONMENT.**

In *Harris*, appellants challenged Arizona's legislative redistricting plan "on the ground that the plan's districts [were] insufficiently equal in population," in violation of the Equal Protection Clause of the Fourteenth Amendment. 136 S. Ct. at 1304. Specifically, appellants argued that although the Arizona plan had a total population deviation between the largest and smallest districts of less than ten percent, the plan was malapportioned because deviations between districts had an illegitimate purpose. *See id.* at 1307; *cf. Cox v. Larios*, 542 U.S. 947 (2004). Rejecting appellants' claim, the Supreme Court found no clear error in the district court's well-supported finding that "the population deviations [in Arizona] were primarily a result of good-faith efforts to comply with the Voting Rights Act" and that because such efforts

reflect a legitimate basis for population deviations, the Arizona plan complied with the Equal Protection Clause. *Harris*, 136 S. Ct. at 1309 (internal quotation marks and citation omitted).

The United States has alleged and proven that Texas adopted its 2011 Congressional Plan and 2011 House Plan with the illegitimate purpose of diluting minority voting strength in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, which enforces the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution. U.S. Post-Trial Br. (ECF No. 1279); U.S. Compl. (ECF No. 907). Unlike appellants in *Harris*, the United States' claim here is intentional vote dilution on the basis of race and language minority status—not malapportionment.<sup>1</sup> Thus, *Harris* erects no barrier to the United States' claims here.

## **II. THE UNITED STATES' CLAIM ONLY REQUIRES PROOF THAT RACIAL DISCRIMINATION WAS A MOTIVATING FACTOR.**

*Harris* established a standard of proof for malapportionment claims with comparatively minor population deviations, but the United States need not meet the *Harris* standard to prove its intentional vote dilution claims. Specifically, *Harris* requires plaintiffs bringing a malapportionment claim against a legislative plan with an overall population deviation of less than 10 percent to prove that the deviation “reflects the predominance of illegitimate reapportionment factors.” *Id.* That predominance requirement, however, does not apply to an intentional vote dilution claim. Like the Equal Protection claim recognized in *Shaw v. Reno*, 509 U.S. 630 (1993), a malapportionment claim is analytically distinct from a claim of intent to injure based on race or ethnicity. *Cf. Miller v. Johnson*, 515 U.S. 900, 911 (1995). As in all other claims of intentional racial discrimination in other contexts, “racial discrimination need only be one purpose, and not even a primary purpose” for a redistricting plan to violate Section

---

<sup>1</sup> MALC and the Perez Plaintiffs assert malapportionment claims against the 2011 House Plan. *See, e.g.,* Jt. Perez and NAACP Br. (ECF No. 1303); MALC Proposed Findings of Fact and Conclusions of Law 45 (ECF No. 1275); Perez Post-Trial Br. 5-9 (ECF No. 1263); MALC 3d Am. Compl. ¶ 81 (ECF No. 897).

2. *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). As a result, while this Court must undertake the “inherently difficult[]” task of measuring factors that account for district boundaries, *Harris*, 136 S. Ct. at 1307, there is no need to compare the relative weight of those factors or to determine that a particular purpose was dominant, primary, or predominant, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). The presence of a discriminatory purpose underlying the 2011 Congressional Plan and 2011 House Plan establishes a violation of the Voting Rights Act.

### III. **HARRIS ILLUSTRATES THE UTILITY OF POPULATION DEVIATIONS TO IMPACT MINORITY ELECTORAL OPPORTUNITIES.**

Beyond setting standards for malapportionment claims, *Harris* demonstrates how population deviations may be used to impact the opportunity of minority voters to elect their preferred candidates. Recognizing that “almost all the Democratic-leaning districts [in the Arizona plan] are somewhat underpopulated and almost all the Republican-leaning districts are somewhat overpopulated,” the Court held that these deviations were nonetheless “explained by the [Arizona Independent Redistricting] Commission’s efforts to maintain at least 10 ability-to-elect districts.” *Harris*, 136 S. Ct. at 1310. The Court further illustrated:

The Commission may have relied on data from its statisticians and Voting Rights Act expert to create districts tailored to achieve preclearance in which minority voters were a larger percentage of the district population. That might have necessitated moving other voters out of those districts, thereby leaving them slightly underpopulated.

*Id.* But of course, a redistricting mechanism that can be used in a permissible manner to preserve minority voting opportunities as required by statute may also be used deliberately to diminish opportunities for minority voters to elect their preferred candidates. *Compare White v. Regester*, 412 U.S. 755, 767, 769 (1973) (mandating the division of Dallas County and Bexar County to create minority opportunity districts needed to cure invidious discrimination), *with LULAC v.*

*Perry*, 548 U.S. 399, 424, 440 (2006) (describing the division of Webb County in a manner that thwarted Latino political mobilization). Thus, nothing in *Harris* suggests that population deviations cannot serve as a piece of evidence that proves discriminatory purpose. In this case, alongside other direct and circumstantial evidence presented at trial, the State's use of population deviations in Hidalgo, Nueces, and Dallas counties helps prove that Texas enacted the 2011 House Plan with a discriminatory purpose. *See Arlington Heights*, 429 U.S. at 266-68.

In Hidalgo County, population deviations are strong cumulative circumstantial evidence of a discriminatory strategy. District 41 had a population of 160,238, which was 7,399 less than the ideal district size. In fact, District 41 was the *only* district in Hidalgo County below the ideal district size and contained 15,145 fewer people than District 39, the most populous district in the County. U.S. Proposed Findings of Fact and Conclusions of Law (U.S. PFOF) ¶¶ 430-432 & tbl.2 (ECF No. 1278). District 41 also had the highest Anglo voting-age population (VAP) share among the four Hidalgo County districts and a Spanish-Surnamed voter registration (SSVR) rate 19.2 percentage points lower than the next most Anglo district in the County. U.S. PFOF ¶¶ 427-429. This strongly suggests that Texas drew District 41 to include as many Anglo voters as could be found in Hidalgo County and then—once there were no concentrations of Anglo voters left to add—ceased adding additional Hispanic population that might have preserved Hispanic voters' electoral opportunity in the district. U.S. PFOF ¶¶ 422, 430. Critically, Texas excluded heavily Hispanic portions of precincts that favored Republicans, which further reduced the District's population and cannot be explained on partisan grounds. U.S. PFOF ¶¶ 433, 437-439, 445, 458-462. Together with the exclusion of Hispanic-preferred representatives from the Hidalgo County districting process, removal of the incumbent's residence from District 41, open disregard for the general policy against splitting precincts, and the contradictory testimony

offered by Ryan Downton and Representative Aaron Peña concerning the origin of the racially divided precinct splits, this evidence proves that Texas intended to reduce or eliminate Hispanic voters' ability to elect their preferred candidate in District 41 of the 2011 House Plan. U.S. PFOF ¶¶ 419-471.

A similar population deviation pattern appears in Nueces County. The 2011 House Plan divided Nueces County into two districts: overpopulated District 34, a heavily Hispanic district with a population of 173,149, and adjacent underpopulated District 32, a district with majority-minority VAP but an Anglo registered voter-majority and a population of 167,074. U.S. PFOF ¶¶ 484-486; U.S. Ex. 374 at 2. By excluding additional Hispanic voters from District 32, Texas furthered its aim to eliminate the preexisting opportunity for Hispanic voters to elect their preferred candidates from two districts in Nueces County. U.S. PFOF ¶¶ 477, 482-493. *Harris* separately supports a finding of intentional vote dilution in Nueces County because—in concluding that Arizona made a “good-faith effort[] to comply with the Voting Rights Act”—the Court specifically noted that Arizona followed the advice of its “Voting Rights Act specialist.” 136 S. Ct. at 1309. In contrast, Texas decided, against the advice of the Texas Legislative Council, to prioritize the Texas County Line Rule, Tex. Const. art. III, § 26, over the Voting Rights Act. Alongside proof that House District 32 is oddly configured to exclude potential Hispanic candidates (both Democrat and Republican), this evidence cumulatively proves that Texas intended to eliminate Hispanic voters' ability to elect their preferred candidates from two Nueces County house districts. U.S. PFOF ¶¶ 472-493.

In western Dallas County, Texas maximized the population deviation in three districts (House Districts 103, 104, and 105) to prevent the emergence of another district in which minority voters could elect their candidates of choice. House Districts 103 and 104—both

unnecessarily packed with Hispanic voters—were also overpopulated, with District 103 precisely 5.0 percent over the ideal district size. U.S. PFOF ¶¶ 524, 534-535, 540; *see also Harris*, 136 S. Ct. at 1308 (holding that Section 5 analysis may “count as ability-to-elect districts ‘crossover’ districts in which white voters combine their votes with minorities”). While Hispanic voters were on the precipice of electing minority candidates of choice in another district in western Dallas County under the 2001 redistricting configuration, U.S. PFOF ¶¶ 519-522, the 2011 House Plan increased the Anglo VAP share of House District 105 by five percentage points, restoring Anglo voting strength that had eroded over the prior decade of demographic change. U.S. PFOF ¶¶ 521, 529, 531-532; *cf. LULAC v. Perry*, 548 U.S. at 440-41. Texas split precincts in House District 105 to keep the more Anglo portions and excise some Hispanic neighborhoods. U.S. PFOF ¶¶ 531-532, 536-539. With Districts 103 and 104 at or near the maximum deviation, however, there was a limit to state’s ability to shed Hispanic voters from District 105 into Districts 103 and 104. So instead, Texas added additional Anglo areas to dilute Hispanic electoral influence. Specifically, Texas also drew a narrow extension from the core of District 105 south towards less Hispanic areas and then expanded the District outward to capture Anglo voters. U.S. PFOF ¶ 532. Adding these Anglo areas increased the population of District 105 to 4.8 percent above the ideal district size. U.S. PFOF ¶ 541. This evidence establishes that it is more likely than not that Texas intentionally eliminated an emerging Hispanic electoral opportunity.

#### **IV. VOTING RIGHTS ACT COMPLIANCE DOES NOT EXPLAIN DEVIATIONS IN THE 2011 HOUSE PLAN.**

Texas cannot plausibly argue that its use of population deviations in the 2011 House Plan—and specifically in Hidalgo County, Nueces County, and western Dallas County—“were primarily a result of good-faith efforts to comply with the Voting Rights Act,” *cf. Harris*, 136 S.



Ct. 1309, let alone wholly driven by nondiscriminatory motives. In each case, the State packed minority voters into overpopulated districts to negate explosive minority population growth or make up for slow growth in Anglo communities, rather than, *e.g.*, underpopulating districts with concentrations of minority voters to preserve their electoral opportunities. *See* Part III, *surpa*. Overall, the 2011 House Plan reduced the number of districts in which minority voters could elect their candidates of choice. *See* Order (ECF No. 690).

For the foregoing reasons, the United States respectfully submits that to the extent that *Harris* has any bearing on this case, it provides further support for the United States' claim that the 2011 House Plan intentionally diluted the votes of Texas's minority citizens.

Date: May 10, 2016

RICHARD L. DURBIN, JR.  
United States Attorney  
Western District of Texas

Respectfully submitted,

VANITA GUPTA  
Principal Deputy Assistant Attorney General  
Civil Rights Division

/s/ Daniel J. Freeman  
T. CHRISTIAN HERREN, JR.  
TIMOTHY F. MELLETT  
JAYE ALLISON SITTON  
DANIEL J. FREEMAN  
PATRICK M. HOLKINS  
Attorneys  
Voting Section, Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
(202) 305-4355

**CERTIFICATE OF SERVICE**

I hereby certify that on May 10, 2016, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

David R. Richards  
Richards Rodriguez & Skeith, LLP  
davidr@rrsfirm.com

Richard E. Grey III  
Gray & Becker, P.C.  
rick.gray@graybecker.com

*Counsel for Perez Plaintiffs  
and Plaintiff-Intervenors Pete Gallego and  
Filemon Vela Jr.*

Luis Roberto Vera, Jr.  
Law Offices of Luis Roberto Vera, Jr. &  
Associates  
lrvlaw@sbcglobal.net  
George Joseph Korbel  
Texas Rio Grande Legal Aid, Inc.  
gkorbel@trla.org

*Counsel for Plaintiff League of United Latin  
American Citizens*

John T. Morris  
johnmorris1939@hotmail.com

*Pro Se Plaintiff*

Nina Perales  
Marisa Bono  
Nicolas Espiritu  
Mexican American Legal Defense  
and Education Fund  
nperales@maldef.org  
mbono@maldef.org  
nespiritu@maldef.org

Mark Anthony Sanchez  
Robert W. Wilson  
Gale, Wilson & Sanchez, PLLC  
masanchez@gws-law.com  
rwwilson@gws-law.com

*Counsel for Plaintiff Latino Redistricting  
Task Force*

Jose Garza  
Law Office of Jose Garza  
garzpalm@aol.com

Mark W. Kiehne  
Ricardo G. Cedillo  
Davis, Cedillo & Mendoza  
mkiehne@lawdcm.com  
rcedillo@lawdcm.com

Joaquin G. Avila  
Seattle University School of Law  
avilaj@seattleu.edu

Cynthia B. Jones  
Jones Legal Group, LLC  
jones.cynthiab@gmail.com

*Counsel for Plaintiff Mexican American  
Legislative Caucus*

Karen M. Kennard  
City of Austin Law Department  
karen.kennard@ci.austin.tx.us

Max Renea Hicks  
Law Office of Max Renea Hicks  
rhicks@renea-hicks.com

Manuel Escobar, Jr.  
Manuel G. Escobar Law Office  
escobarm1@aol.com

Marc Erik Elias  
Abha Khanna  
Perkins Coie LLP  
akhanna@perkinscoie.com  
melias@perkinscoie.com

S. Abraham Kuczaj, III  
Stephen E. McConnico  
Sam Johnson  
Scott Douglass & McConnico, LLP  
akuczaj@scottdoug.com  
smcconnico@scottdoug.com  
sjohnson@scottdoug.com

David Escamilla  
Travis County Ass't Attorney  
david.escamilla@co.travis.tx.us

*Counsel for Rodriguez Plaintiffs*

Gerald Harris Goldstein  
Donald H. Flanary, III  
Goldstein, Goldstein and Hilley  
ggandh@aol.com  
donflanary@hotmail.com

Paul M. Smith  
Michael B. DeSanctis  
Jessica Ring Amunson  
Jenner & Block LLP  
psmith@jenner.Com  
mdesantis@jenner.Com  
jamunson@jenner.Com

J. Gerald Hebert  
Law Office of Joseph Gerald Hebert  
hebert@voterlaw.com

Jesse Gaines  
Law Office of Jesse Gaines  
gainesjesse@ymail.com

*Counsel for Quesada Plaintiff-Intervenors*

Rolando L. Rios  
Law Offices of Rolando L. Rios  
rrios@rolandorioslaw.com

*Counsel for Plaintiff-Intervenor Henry Cuellar*

Gary L. Bledsoe  
Law Office of Gary L. Bledsoe  
garybledsoe@sbcglobal.net

Victor L. Goode  
NAACP  
vgoode@naacpnet.org

Robert Notzon  
Law Office of Robert Notzon  
robert@notzonlaw.com

Anita Sue Earls  
Allison Jean Riggs  
Southern Coalition for Social Justice  
allison@southerncoalition.org  
anita@southerncoalition.org

*Counsel for Plaintiff-Intervenor Texas State  
Conference of NAACP Branches*

Chad W. Dunn  
K. Scott Brazil  
Brazil & Dunn  
chad@brazilanddunn.com  
scott@brazilanddunn.com

*Counsel for Plaintiff-Intervenor Texas  
Democratic Party*

John K. Tanner  
John Tanner Law Office  
3743 Military Rd. NW  
Washington, DC 20015

*Counsel for Plaintiff-Intervenor Texas  
Legislative Black Caucus*

Hector De Leon  
Benjamin S. De Leon  
De Leon & Washburn, P.C.  
hdeleon@dwlawtx.com  
bdeleon@dwlawtx.com

Eric Christopher Opiela  
Eric Opiela PLLC  
eopiela@ericopiela.com

Christopher K. Gober  
Michael Hilgers  
Gober Hilgers PLLC  
cgober@goberhilgers.com  
mhilgers@goberhilgers.com

James Edwin Trainor, III  
Beirne, Maynard & Parsons, LLP  
ttrainor@bmpllp.com

Joseph M. Nixon  
Beirne Maynard & Parsons LLP  
jnixon@bmpllp.com

*Counsel for Plaintiff-Intervenors Joe Barton  
et al.*

Scott Keller  
Matthew Frederick  
Angela V. Colmenero  
Ana M. Jordan  
Jennifer Settle Jackson  
Adam Bitter  
William T. Deane  
Summer R. Lee  
Michael B. Neill  
Office of the Texas Attorney General  
scott.keller@texasattorneygeneral.gov  
matthew.frederick@  
texasattorneygeneral.gov  
angela.colmenero@  
texasattorneygeneral.gov  
ana.jordan@oag.state.tx.us  
jennifer.jackson@texasattorneygeneral.gov  
adam.bitter@texasattorneygeneral.gov  
bill.deane@texasattorneygeneral.gov  
summer.lee@texasattorneygeneral.gov  
michael.neill@texasattorneygeneral.gov

*Counsel for Defendants State of Texas and  
Greg Abbott and Defendant-Intervenors  
David Dewhurst, Joe Strauss, and John  
Steen*

Donna Garcia Davidson  
Donna G. Davidson Law Firm  
donna@dgdlawfirm.com

Frank M. Reilly  
Potts & Reilly, LLP  
reilly@pottsreilly.com

*Counsel for Defendant-Intervenors Steve  
Munisteri*

Kent M. Adams  
Lewis, Brisbois, Bisgaard, & Smith LLP  
kadams@lbbslaw.com

*Counsel to Defendant-Intervenor Sarah M.  
Davis*

Clarkson F. Brown  
Bexar County District Attorney's Office,  
101 W Nueva, Suite 5049  
San Antonio, TX 78205  
(210) 335-2150  
clarkb@bexar.org

*Counsel for Amicus Curiae Bexar County*

Ned Bennet Sandlin  
Texas Municipal League  
bennett@tml.org

*Counsel for Amicus Curiae Texas Municipal  
League*

Manuel A. Pelaez-Prada  
Pelaez Prada, PLLC  
mpp@lonestaradr.com

*Counsel for Amicus Curiae San Antonio  
Hispanic Chamber of Commerce*

/s/ Daniel J. Freeman  
DANIEL J. FREEMAN  
Attorney, Voting Section  
Civil Rights Division  
U.S. Department of Justice  
Room 7123 NWB  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
daniel.freeman@usdoj.gov